

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-2036

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
:
EDWARD NEWFIELD,
:

Appellant,
:

-against-
:

UNITED STATES OF AMERICA,
:

Appellee.
:
-----X

Docket No. 77-2036

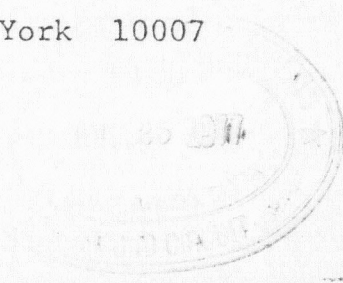
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REPLY BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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EDWARD N. WFIELD, :
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Appellant, :
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REPLY BRIEF FOR APPELLANT

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THIS APPEAL IS NOT UNTIMELY; IN
ANY EVENT, THIS COURT SHOULD NOT
DISMISS THE APPEAL.

The Court's final order in this case was filed on March
10, 1976, with appellant's notice of appeal therefore required

to be filed on Monday, May 10, 1976.* By letter dated May 6, 1976, this pro se litigant wrote to the Court clerk requesting to be permitted to appeal the judgment. In his letter, appellant also related how he had recently been transferred without notice to the Fulton County jail in Atlanta, Georgia where he was in a "quasi incommunicado situation...far removed from friends and family and [could not] readily effect access to a long distance telephone." In addition, appellant noted that a specific Assistant United States Attorney had promised to file a notice of appeal but had failed to file it, and that he had failed to receive any assistance from the local public defender's office. Almost one thousand miles from the Western District of New York, separated from family, friends, and legal counsel, appellant requested that the letter, the accuracy of which has not been disputed by the Government in any particular, be accepted as a notice of appeal.**

*The 60th day, May 9, 1976, was a Sunday, so the final date for filing the notice of appeal was Monday, May 10, 1976. See Fed. R. App. P. 26(a); Alley v. Dodge Hotel, 501 F.2d 880, 885 n.18 (D.C. Cir. 1974).

**A copy of appellant's letter is set forth in the addendum to Respondent's Brief and is also a part of the record on appeal.

On May 11, 1976, one day after the 60 day filing deadline,* appellant's letter was received by the clerk. Unlike most notices of appeal, appellant's letter was transmitted to a judge, apparently Judge Burke, who, prior to May 20, 1976, endorsed the letter approving filing of the letter as an in forma pauperis appeal. On May 20, 1976, the letter was filed as a notice of appeal, and a copy of the notice of appeal was mailed to the United States Attorney's office** which failed to move below to dismiss the appeal.

Despite appellant's obvious efforts to comply with the filing deadline, and the district court's explicit decision treating his letter as a notice of appeal, the Government now argues that the day-late receipt in the clerk's office of appellant's letter is an absolute jurisdictional bar to consideration of this appeal. The Government's contention is simply incorrect.

The Government begins on the wrong foot by assuming that the day-late receipt of appellant's notice of appeal is conclusive evidence that the appeal is untimely. This assumption ignores the Supreme Court's decision in Fallen v. United States, 378 U.S. 139 (1964). In Fallen, the pro se defendant's notice of appeal was received by the clerk four days after the filing deadline, in circumstances remarkably similar to the instant

*For some reason, the date of receipt in the clerk's office has been crossed-out. However, examination of the letter indicates that it was received in the first instance on May 11.

**See Docket Sheet set forth as "A" to appellant's separate appendix.

case. After the judgment Fallen was moved from his place of incarceration in Florida to Atlanta and was unable to visit family and friends. Two days prior to the filing deadline he wrote his letter, but the letter was not received for another six days. Noting that there was no reason to doubt that the date of Fallen's letter was accurate, that subsequent delays were not chargeable to him, and that he had done all that could reasonably be expected of him to achieve timely filing, the Court held that the application should be deemed to have been timely filed. Id. at 143-144. While Fallen was a criminal case,* its decision has repeatedly been held applicable for pro se civil litigants as well. See, Alley v. Dodge Hotel, 501 F.2d 820, 834-835 (D.C. Cir. 1974); Rothman v. United States, 508 F.2d 643, 652 (3rd Cir. 1975); see also Striling v. Chemical Bank, 511 F.2d 1030, 1031-1032 (2d Cir. 1975) (untimely filing of notice of appeal by civil litigant with counsel; court remands for determination on excusable neglect but notes that "[w]ere appellants pro se litigants we might be inclined toward a liberal interpretation of their unsuccessful filing efforts.")

The reasons for this eminently common sense approach were pointed out by the court in Alley, supra, which noted

...it is clear beyond cavil that Appellate Rules 3 and 4 tolerate a common sense approach to timely filing, and do not insist upon "literal compliance in cases in which it cannot fairly be exacted..." We think

*See also United States v. Grimes, 426 F.2d 706 (5th Cir. 1970) (Applying Fallen in criminal case).

that a filing requirement is met by a positive, substantial and unequivocal effort to discharge it, and that innocuous irregularities incidental to such an endeavor should be disregarded when considerations of fairness dictate this course.

501 F.2d at 384.

Of course, these considerations apply most compellingly when the appellant is a pro se litigant, untrained in the law. See Haines v. Kerner, 404 U.S. 519 (1972). The circumstances in this case clearly call for permitting appellant's application, dated some five days in advance of the filing deadline to be considered as complying with the filing requirement. Like Fallen there is no suggestion by the Government that the letter was not mailed on the date specified in the letter; like Fallen, since appellant was incarcerated hundreds of miles from the Western District of New York, there is no more he could have done than he did to assure timely filing. Accordingly, the notice of appeal should be held to be timely filed. Indeed, we submit that the court below implicitly so found when it accepted appellant's letter as a notice of appeal and permitted the in forma pauperis filing.

In any event, even if the appeal is deemed untimely filed the case should not be dismissed, and the Government errs again when it contends that this is the appropriate (or necessary) course. While Rule 4 of the Fed. R. App. P. provides that for an appeal such as this, where the Government is a party, the appeal should be filed in 60 days, the rule also provides that "[u]pon a showing of excusable neglect the district court may

extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision."

Appellant's letter to the court by its very terms clearly established that appellant's neglect, if any, was completely excusable. Since it was filed well within the 30 day period allowed for extensions of time, and stated a prima facie case of excusable neglect, the court below could have considered it as a motion to extend the time for filing because of excusable neglect. Stirling v. Chemical Bank, supra, 511 F.2d at 1032. Here, it appears that that is exactly what the district court did, for the court explicitly permitted appellant's letter to the clerk to serve as an in forma pauperis notice of appeal. And, while the Government was not given notice of appellant's letter when received by the clerk, a copy of the notice was mailed to the United States Attorney's office on May 20, 1976. Accordingly, the court's decision should be taken as permission for appellant to file his appeal out of time.* At the very least, the court should retain jurisdiction of the appeal and remand for an opportunity for the court formally to permit

*Compare Torokio v. Chamberlain, 456 F.2d 1084 (3rd Cir. 1972) (en banc) (case remanded where notice of appeal filed after 30 day period and no district court approval) with United States v. Mills, 430 F.2d 526, 528 (8th Cir. 1970), cert. denied, 400 U.S. 1023 (1971), (late notice of appeal accepted by District Court in coram nobis proceeding considered equivalent of finding of excusable neglect).

appellant's notice of appeal to be filed out of time on the ground of excusable neglect, as was done by this Court in Striling v. Chemical Bank, supra. Accord, Cramer v. Wise, 494 F.2d 1185 (5th Cir. 1974); Bryant v. Elliot, 467 F.2d 1109 (5th Cir. 1972); Evans v. Jones, 366 F.2d 772 (4th Cir. 1966).

Conclusion

For the above stated reasons the appeal should be held to be timely or permissible by reason of excusable neglect. In the alternative, the judgment should be remanded for a determination by the District Court of excusable neglect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

July 25, 1977

I certify that a copy of this ^{reply} brief [REDACTED]
has been mailed to the United States Attorney for the
Western District of New York.

Paul J. Giffel